



Signed: November 18, 2010

EDWARD D. JELLEN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
EDUARDO A. VERGARA,
Debtor. /
ARTURO MARTINEZ,
Plaintiff,
vs.
EDUARDO A. VERGARA,
Defendant. /

No. Case 09-70380 J
Adv. No. 10-4029 AJ
Chapter 7
Date: 11/09/10
Time: 10:00 a.m.
Ctrm: 215

DECISION

By this adversary proceeding, plaintiff Arturo Martinez ("Martinez") seeks to render nondischargeable a debt he is owed by defendant Eduardo Vergara, the above debtor ("Vergara"). The court will enter judgment in favor of Vergara.

A. Background

In 2002, Vergara took over management responsibilities for a 13 unit building on MacArthur Boulevard in Oakland, California (the "Property") that Martinez had acquired the previous year.

Decision

1 Thereafter, Vergara and Martinez informally agreed that Martinez
2 would sell Vergara a 20% interest in the Property. In April 2005,
3 Vergara and Martinez discussed the possibility of Vergara purchasing
4 the entire Property from Martinez. At the time of these
5 discussions, the Property was in a state of disrepair. It was only
6 partially rented out, and many of the tenants were engaging in
7 illegal activity on the premises. Vergara's intent was to renovate
8 and rehabilitate the Property and then refinance it.

9 The discussions between Vergara and Martinez resulted in the
10 parties signing a handwritten term sheet dated April 2005 under
11 which Vergara was to pay Martinez \$450,000 for his equity in the
12 Property, such payments to be made over a period of five years.

13 In late September 2005, Martinez and Vergara entered into a
14 more formal purchase agreement, which provided that Vergara would
15 purchase the Property for the sum of \$910,000. The purchase
16 agreement stated that it was "merely a memorial of a previous
17 agreement with all terms the same dated April 1, 2005."

18 On October 17, 2005, Martinez and Vergara entered into an
19 addendum to the purchase agreement providing for Martinez to carry
20 back a note for \$450,000, and for Vergara to assume all the debts on
21 the Property, including mortgage payments, taxes, and insurance.

22 The addendum stated that Vergara would refinance the Property.
23 If he did so within six months, Vergara was to pay \$100,000 to
24 Martinez immediately on the refinance, and then pay certain
25 installment payments to Martinez. If, however, the refinance
26 occurred after passage of the six month period, then payment of the

1 \$100,000 was to be deferred according to an alternate payment
2 schedule specified in the addendum. One additional addendum
3 followed, which altered some of the payment terms.

4 On October 19, 2005, Martinez conveyed the Property to Vergara
5 by grant deed. Vergara's purchase money debt to Martinez was
6 unsecured.

7 In November 2006, Vergara refinanced the Property, and realized
8 a substantial gain from the refinance transaction. Because the
9 refinance occurred after passage of the six month period mentioned
10 in the contract addendum, Vergara was not contractually required to
11 make the immediate \$100,000 payment, and he did not do so.

12 The parties agree that Vergara paid Martinez a total of \$86,945
13 toward the purchase price. Vergara testified that he had also paid
14 substantial sums for mortgage payments on the Property before he
15 acquired title, and had also paid over \$62,000 plus attorneys' fees
16 to settle several lawsuits related to the Property. The parties
17 disagree as to whether these expenditures by Vergara were to be
18 credited against Vergara's debt to Martinez.

19 In any event, Vergara eventually lost the Property through
20 foreclosure. On October 30, 2009, Vergara filed his voluntary
21 petition herein under chapter 7 of the Bankruptcy Code. This
22 adversary proceeding followed.

23 Martinez's complaint alleges that Vergara still owes him
24 \$450,000 consisting of the unpaid portion of the purchase price for
25 the Property plus an unliquidated amount for rents that Martinez
26 contends that Vergara absconded with, and that this debt is

nondischargeable pursuant to Bankruptcy Code § 523(a)(2)(A) (fraud),
523(a)(2)(B) (false financial statement), and 523(a)(4) (fiduciary
fraud or defalcation).

B. Discussion

At the conclusion of Martinez's case in chief, the court
granted Vergara's motion pursuant to Fed. R. Civ. P. 52(c),
applicable via Fed. R. Bankr. P. 7052, for judgment in his favor on
Martinez's claims under Bankruptcy Code § 523(a)(2)(B)¹ and
523(a)(4).²

¹Bankruptcy Code § 523(a)(2)(B) provides:

(a) A discharge under section 727 . . . of this title does
not discharge an individual debtor from any debt -

. . .

(2) for money, property, services, or an extension, renewal,
or refinancing of credit, to the extent obtained, by -

. . .

(B) use of a statement in writing--

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial
condition;

(iii) on which the creditor to whom the debtor is liable for
such money, property, services, or credit reasonably relied;
and

(iv) that the debtor caused to be made or published with
intent to deceive. . .

²Bankruptcy Code § 523(a)(4) provides:

A discharge under section 727 . . . of this title does
not discharge an individual debtor from any debt -

. . .

(4) for fraud or defalcation while acting in a

(continued...)

1 As to the former, the evidence failed to show that Vergara ever
2 provided Martinez with any statement in writing respecting his
3 financial condition.³

4 As to the latter, it is true that at the time of the purchase,
5 Vergara was a licensed real estate broker, and a licensed attorney.
6 It is also true that Martinez trusted him.

7 This, however, does not create a fiduciary relationship within
8 the meaning of Bankruptcy Code § 523(a)(4). In their dealings,
9 Vergara acted as a principal, not as a broker or attorney. A
10 provision in the purchase agreement so stated.

11 In In re Baird, 114 B.R. 198 (9th Cir. BAP 1990), the Ninth
12 Circuit Bankruptcy Appellate Panel took the occasion to explain the
13 meaning of "fiduciary capacity" under Bankruptcy Code § 523(a)(4).
14 The BAP explained:

15 The meaning of 'fiduciary capacity' under section
16 523(a)(4) is a question of federal law, which has
17 consistently limited this term to express or technical
18 trust relationships. The broad general definition of a
19 fiduciary relationship - one involving confidence, trust
20 and good faith - is inapplicable in the dischargeability
21 context. The debt alleged to be nondischargeable must
22 arise from a breach of trust obligations imposed by law,
23 separate and distinct from any breach of contract. In
24 addition, the requisite trust relationship must exist
25 prior to and without reference to the act of wrongdoing.
26 This requirement eliminates constructive, resulting or
implied trusts.

23 ²(...continued)
24 fiduciary capacity, embezzlement, or larceny.

25 ³Indeed, Vergara never provided Martinez orally with any
26 information about his financial condition, nor did Martinez ever
request any such information.

1 Baird, 114 B.R. at 202 (internal citations omitted).

2 The evidence failed to show that Vergara was in a fiduciary
3 relationship with Martinez.

4 As to Martinez's fraud claims, Bankruptcy Code § 523(a)(2)(A)
5 provides: "A discharge under section 727 . . . of this title does
6 not discharge an individual debtor from any debt - . . . (2) for
7 money, property, services, or an extension, renewal, or refinancing
8 of credit, to the extent obtained, by - (A) false pretenses, a false
9 representation, or actual fraud, other than a statement respecting
10 the debtor's or an insider's financial condition."

11 To prevail under § 523(a)(2)(A), a creditor must establish
12 that: (1) the debtor made a representation, (2) with knowledge of
13 its falsity, (3) with the intention and purpose of deceiving the
14 creditor, (4) that the creditor justifiably relied on the
15 representation, Field v. Mans, 516 U.S. 59, 116 S.Ct. 437
16 (1995)(justifiable reliance required), and (5) that the creditor
17 sustained damage as the proximate result thereof. See In re
18 Britton, 950 F.2d 602, 604 (9th Cir. 1991). The creditor must
19 establish each of these elements by a preponderance of the evidence.
20 Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654 (1991).

21 Here, the evidence failed to establish any fraud on the part of
22 Vergara. The evidence did not establish or even suggest that
23 Vergara made any misrepresentations to Martinez, or that he had any
24 intent to deceive Martinez when he contracted to purchase the
25 Property. Nor did the evidence show that Vergara misappropriated
26 ///

1 any rents (or even show the amount of the monthly rents, if any,
2 that the Property generated).

3 Martinez argues that, during the period after the parties had
4 entered into the purchase agreement, and prior to the transfer of
5 title, Vergara had caused some mass evictions on the Property,
6 thereby reducing the income the Property generated, and that the
7 timing of these evictions evidences Vergara's fraudulent intent.
8 Given the state of the Property and the unsatisfactory quality of
9 its tenants, such evictions seem, if anything, to have been prudent,
10 and are in no way indicative of any fraud on the part of Vergara.

11 C. Conclusion

12 Martinez entered into what turned out to be an unwise
13 bargain. He agreed to sell the Property to Vergara on an unsecured
14 basis, leaving himself at risk when he surrendered title, and
15 unprotected when Vergara obtained substantial sums out of the
16 refinance. Unfortunately for Martinez, Bankruptcy Code
17 § 523(a)(2)(A) does not provide a remedy for an unwise bargain. The
18 court will therefore enter judgment in favor of Vergara.

19
20 **END OF ORDER**
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